IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 386

ALINE SWINFORD,

Petitioner,

v.

ALLIED FINANCE COMPANY OF CASA VIEW,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

PETITIONER'S REPLY BRIEF

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Aline Swinford, hereby submits this her Reply Brief to the Brief for Respondent filed in this Court on or about September 4, 1968.

REPLY TO JURISDICTION

First Reason: Respondent's assertion that petitioner's Fifth Point of Error in the Supreme Court of Texas fails to preserve the federal errors complained of is erroneous. Petitioner's statement of fact under the Fourth and Fifth Points (R. 165) made it crystal clear to the Supreme Court of Texas that petitioner's Fifth Point of Error was the same in substance as the federal points raised in the Court of Civil Appeals of Texas, and respondent made no challenge to said statement (R. 185-186).

Second Reason: Respondent's cited reason is not a valid argument against invoking this Court's jurisdiction, because petitioner seeks not an advisory opinion, but an opinion ipsojure to a controversy below involving a wrong interpretation of the due process clause of the Fourteenth Amendment. Herb v. Pitcairn, 324 U.S. 114 (1945).

REPLY TO STATEMENT

Respondent's challenge to petitioner's statement of the case is erroneous. Petitioner's statement is complete and accurate as presented, viz:

1. Petitioner's statement concerning her former husband, community estate, etc. is supported by the record below (R. 58).
2. Petitioner's statement relative to hearing date on her plea in abatement is supported by the record below (R. 34 at line 7).
3. Petitioner's statement of making a special appearance is shown by the record

below (R. 12-16) and her original answer was made subject to the special appearance plea (R. 17 at line 16), and respondent did not except to the plea's form or substance. Petitioner also apprised all of the courts below that said plea should be heard and disposed of before she could properly make a general appearance (R. 33, 62-63, 68, 120-125, 164-169).

Petitioner submits that her statement of the case is sufficient, accurate and conforms to the record below in all respects.

REPLY TO COUNTERPOINTS I AND II

Respondent's assertion that petitioner had notice of hearing on her plea in abatement, for any date, is clearly incorrect. The record speaks for itself, to-wit:

1. The fiat (R. 26) respondent refers to sets hearing on respondent's motion for summary judgment, and not petitioner's plea in abatement. In addition, said fiat date is in irreconcilable conflict with recitation in the trial court judgment (R. 34).

2. The supplemental record respondent relies on is not a part of the proceedings had in either of the State appellate courts below, but comes from the trial court after petitioner's appellate step of last resort in the State judiciary system. In effect, such supplemental record is extrinsic and is violative of United States Supreme Court Rule No.40(5).

3. Petitioner's memorandum to the court (R. 33) supports petitioner's contention that she had no notice of any

hearing being set on her plea in abatement.

4. Respondent's letter dated March 13, 1967 is not signed by a member of the bar and its contents makes no mention of any hearing being set on petitioner's plea in abatement.

Petitioner points out to this Honorable Court that respondent was given ample opportunity to designate the transcript of the trial court and a designation was made by respondent (R. 44) wherein respondent (at line 20) states to the Clerk: "This order was transmitted to the County Court at Law No. 3 by our letter of March 31, 1967" (emphasis added). Then the trial court Clerk's certified bill of costs (R. 46 at line 16) shows a transaction date of April 4, 1967 for entering the aforesaid order. This April 4 date appears as the identical transaction date for entry of the final judgment (R. 46 at line 17). All of these dates are in irreconcilable conflict and we believe the same should be resolved in favor of petitioner who opposes summary judgment.

It is apparent that respondent's brief does not address itself to the questions presented in petitioner's application, and wholly fails to cite any U.S. Supreme Court authorities condoning the holding of the Court of Civil Appeals of Texas that failure or refusal to give petitioner notice was a harmless error.

Petitioner submits that the record supports her statements and plainly shows the decision sought to be reviewed to be contrary to the Fourteenth Amendment of

the United States Constitution.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for petitioner hereby certifies that a true copy hereof was served upon all parties required to be served by depositing the same in the United States Post Office as prepaid first class air mail, addressed to Mr. John Lewis Shook of the firm of Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201, the attorneys for respondent, on the ____ day of _____ 1968.

THOMAS P. BROWN III